



Town of Tyngsborough
 Zoning Board of Appeals
 Town Hall-25 Bryants Lane
 Tyngsborough, Ma 01879-1003
 (978) 649-2300, Ext. 112

APPROVED

Board of Appeals Meeting Minutes for February 10, 2011

Members present: Robb Kydd, Chairman, Chris Mechalides, Vice Chairman, Cheryl Bradley, Claire Cloutier, Joseph Polin, Scott Bordeleau and Donna McPartlan, Administrative Assistant

6:30PM: Meeting called to order by Chairman Robb Kydd

1st Hearing: STANLEY C. FABIANSKI AND CLAIRE P. FABIANSKI – 10 OAK

STREET.: Assessors Map 31B; Lot 42-0; request a Variance and Special Permit to raze residential existing structure to improve property with new dwelling. R-1 Zone; Section 2.12.50 and 2.15.22

Advertised in the Lowell Sun on Thursday, December 30, 2010 and Thursday, January 6, 2011 (continued from January 13, 2011)

This hearing was held on Thursday, February 10, 2011, continued from January 13, 2011.

The applicant was represented by Attorney Peter Nicosia.

The board members sitting on this hearing were Robb Kydd, Chris Mechalides, Claire Cloutier, Joseph Polin, and Scott Bordeleau.

At the public hearing the Board heard testimony from Attorney Nicosia. There were no abutters present at this hearing.

Finding of Fact:

The property in question located at Assessors Map 31B Lot 42-0; and is Zoned District R-1.

The applicant is requesting a Variance and Special Permit to raze residential existing structure to improve property with new dwelling. All required documents and plans were provided.

Decision:

After the testimony the board closed the public portion of the hearing. The board discussed the hearing, taking into consideration the facts as presented by the applicant, and Attorney Nicosia.

Motion to APPROVE a Variance and Special Permit to raze residential existing structure to improve property with new dwelling.

Robb Kydd, Chair	AYE
Joseph Polin	AYE
Claire Cloutier	AYE
Chris Mechalides	AYE
Scott Bordeleau	AYE

Conclusion: **APPROVED.** Zoning Board of Appeals vote to APPROVE a Variance of Sections 2.12.50 of the Zoning By-Laws of the Town of Tyngsborough for allowance of minimum lot area as existing and a minimum lot frontage 100 in a Zoned District R-1. Vote – Aye, Carries Unanimous

APPROVED. Zoning Board of Appeals vote to APPROVE a Special Permit of Sections 2.15.22 of the Zoning By-Laws of the Town of Tyngsborough for a renovation of a preexisting non conforming structure. Zoned District R-1. The Board of Appeals finds that such change, extension or alteration is not substantially more detrimental. Vote – Aye, Carries Unanimous.

2nd Hearing: SBA Towers II, LLC by their attorneys Deschenes & Farrell, PC – 180 Sherburne Ave.: Assessors Map 28; Lot 117; request a Variance per the Federal Telecommunications Act of 1996; and any other permit relief as may be required under the Zoning Bylaw of Tyngsborough to allow the proposed use. Applicant proposes to construct a 160' wireless communication facility and associated equipment fenced in compound area according to plans that are on file with the Town of Tyngsborough Zoning Department. Premises affected in an R-1 Zone, Section 4.16.

Advertised in the Lowell Sun on January 27, 2011 and February 3, 2011.

Members present for this hearing were Robb Kydd, Chris Mechalides, Claire Cloutier, Joe Polin and Scott Bordeleau. Charles J. Zaroulis, Esq. was present on behalf of the Town.

The case was presented by Kevin S. Eriksen, Esq. of Deschenes & Farrell, P.C., One Billerica Road, Chelmsford, Massachusetts, along with T-Mobile Northeast Inc.'s, a wholly owned subsidiary of T-Mobile USA, Inc., ("T-Mobile") radio frequency engineer, Dinesh Dasani of 15 Commerce Way Suite B, Norton, Massachusetts.

The Applicant filed the following plans with the Board (the "Plans"):

"SBA, Tyngsborough" Applicant: SBA Towers, Inc., 5900 Broken Sound, Parkway, NW, Boca Raton, FL 33487-2797, Tel: (561) 226-9523, Fax: (561) 226-9368, Co-Applicant: T-Mobile Northeast, LLC, 15 Commerce Way, Suite B, Norton, MA 02766, Office: (508) 286-2700, Fax: (508) 286-2893, Engineering: Aerial Spectrum Incorporated, 20 Blanchard Road, Suite 4, Burlington, MA 01803, tel. (781) 272-6200, fax (781) 272-6225, e-mail ekeman@aerialspectrum.com, Revised through 1/20/11.

Also contained within Application or submitted as supplemental material, were additional supporting documents which included but were not necessarily limited to; a Land Owner Authorization form; Designers Certificate, Affidavit of Radio Frequency Expert from T-Mobile; Coverage Maps from T-Mobile; Affidavit from Site Acquisition Specialist; Deeds of the Property detailing ownership; FCC License for T-Mobile; Tower Design Specifications; Balloon Float Report; Photo Simulation Report and Visual Impact Analysis Report; Decision from the Town of Tyngsborough Planning Board filed with the Town Clerk on February 4, 2011 (the "Planning Board Decision") granting the Applicant a Special Use Permit for the construction of a wireless communication facility on the Property.

In the Application, and at the Hearings, the Applicant's counsel and T-Mobile's Radio Frequency Engineers described the nature of T-Mobile's significant gap in coverage in the vicinity of the proposed installation. T-Mobile's radio frequency engineers presented radio frequency coverage plots that identified the gap in coverage and another plot that depicted the resulting coverage from the proposed installation on the Property. Through testimony and the coverage plots provided, the Applicant and T-Mobile demonstrated a significant gap in coverage, and that even with the existing sites in the telecommunication zoning districts, T-Mobile is unable to provide adequate coverage to this significant gap in its network. Applicant's counsel discussed why, pursuant to the Telecommunications Act of 1996 (the "Act"), the Board had the authority to grant the requested use variance, notwithstanding the prohibition against the granting of a use variance pursuant to Section 1.13.21 of the Bylaw. Town Counsel also explained the effect of the Act's relevance to the Board.

In considering alternative sites, the Board reviewed the affidavit provided by the Applicant's Site Acquisition Specialist which detailed over nine (9) sites researched and considered by the Applicant prior to the selection of the Property as the proposed location for the wireless communication facility. Testimony was also provided by the Applicant at the hearing describing how the wooded nature, size and current use of the Property make the site suitable for the proposed installation. The Applicant demonstrated to the Board's satisfaction that there are no reasonably feasible and commercially available alternative sites upon which this facility could be located and provide adequate coverage to this significant gap.

The Board offered to receive testimony from abutters, however none spoke in regard to the Application. The Board also received written submissions from various Town Departments including the Planning Board and the Highway Department.

FINDINGS & DECISION

Based upon the information submitted to the Board and the testimony at the Hearings, the Board hereby makes the following findings:

1. The Property is located in the R-1 zoning District. It consists of approximately 53 +/- acres.
2. The Board finds that the Applicant was previously granted a Special Use Permit by the Town of Tyngsborough Planning Board which permit was filed with the Town of Tyngsborough Town Clerk on February 4, 2011.
3. The Board finds that the Applicant and T-Mobile have provided credible scientific evidence to demonstrate that T-Mobile has a significant gap in coverage in the area surrounding the Property.
4. The Board finds that the Applicant and T-Mobile have sufficiently demonstrated that T-Mobile cannot provide adequate coverage to this significant gap in its network utilizing the telecommunications zoning districts.
5. The Board finds that the Applicant and T-Mobile have demonstrated that there are no reasonably feasible alternative sites available, including potential alternative sites outside the telecommunications zoning district that will allow T-Mobile to provide adequate coverage to this significant gap in its network.

For the foregoing reasons, the Board finds that the denial of the requested use variance would leave T-Mobile with a significant gap in its coverage network, and without any alternative from which it can provide coverage to this significant gap. Accordingly, the Board finds that the denial of the requested use variance would prohibit or have the effect of prohibiting T-Mobile's provision of personal wireless services.

In light of the Board's finding that the denial of the requested relief will prohibit or have the effect of prohibiting T-Mobile's provision of personal wireless services, the Board finds that, notwithstanding the Bylaw and State Law, in the present case, it has the authority to grant a use variance pursuant to the Act. In determining that the Board has the authority to grant the requested relief the Board considered the Applicant's supporting statements submitted with the Application, the statements of the Applicant's counsel and the statements of Town Counsel.

Therefore, acting under its discretionary power, the Board voted unanimously to grant the requested use variance described above, permitting the Applicant to construct the wireless facility designated on the Plan on the Property located within an R-1 Zone and permitting T-Mobile to locate on said wireless facility.

In rendering this Decision, the Zoning Board of Appeals notes that the variance issued hereunder shall expire within twelve (12) months if the rights authorized by the variance are not exercised within one year of the date of the grant (exclusive of the time required to pursue or await the determination of an

appeal referred to in Massachusetts General Laws, Chapter 40A § 17). However, the permit granting authority in its discretion and upon written application by the grantee of such rights may extend the time for exercise of such rights provided that the application for such extension is filed with such permit granting authority prior to the expiration of such one year period.

Appeals, if any, shall be made pursuant to Massachusetts General Laws, Chapter 40A, § 17 and shall be filed within twenty days after the date of the filing of this Decision in the Office of the Tyngsborough Town Clerk.

This Decision shall not take effect until a copy of the Decision, bearing the certification of the Tyngsborough Town Clerk that twenty days have elapsed after the Decision has been filed in the Office of the Tyngsborough Town Clerk and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied, is recorded with the Registry of Deeds for the county and district in which the land is located and indexed, in the grantor index under the name of the owners of record or is recorded and noted on the owners' certificate of title.

Motion to close the public portion of the hearing by <>, Seconded by <>. Vote

Other Business

Reconsideration / Modification of the Comprehensive Permit Request for Whispering Pines Estate (continued from 9/9/10)

Not present to speak

Maple Ridge Development

Planning Board Request for Comment on Site Plan Review Special Permit

8:53PM: Motion made to adjourn by Robb Kydd, second by Scott Bordeleau

AYE – Unanimous